55

Supreme Court, U.S.
FILED

061509 MAY 11 2007

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL H. BOULWARE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

John D. Cline
Counsel of Record
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
(415) 626-3939
Counsel for Petitioner

QUESTIONS PRESENTED

1. What effect must a federal court give a final, non-collusive state court judgment adjudicating ownership of property in determining a taxpayer's federal income tax liability arising from that property?

2. Whether a taxpayer who seeks to invoke the return of capital rule in a criminal tax case must show a contemporaneous intent to treat the corporate distribution as a return of capital?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. THE COURT SHOULD GRANT THE WRIT TO CLARIFY THE EFFECT OF STATE COURT JUDGMENTS IN FEDERAL TAX CONTROVERSIES 7

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE RETURN OF CAPITAL RULE 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aquilino v. United States,
363 U.S. 509 (1960).....7

Blair v. Commissioner,
300 U.S. 5 (1937).....7, 8, 9, 10

Commissioner v. Estate of Bosch,
387 U.S. 456 (1967).....7, 8, 9, 10

Estate of Delaune v. United States,
143 F.3d 995 (5th Cir. 1998).....9

Estate of Warren v. Commissioner,
981 F.2d 776 (5th Cir. 1993).....9

Freuler v. Commissioner,
291 U.S. 35 (1934).....7, 8, 9, 10

Truesdell v. Commissioner,
89 T.C. 1280 (1987).....11, 13, 15, 16

United States v. Bok,
156 F.3d 157 (2d Cir. 1998).....11, 13, 14, 15, 16

United States v. D'Agostino,
145 F.3d 69 (2d Cir. 1998).....11, 14

United States v. Miller,
545 F.2d 1204 (9th Cir. 1976).....5, 6, 12, 13, 16

United States v. Mitchell,
403 U.S. 190 (1971).....7, 9

United States v. National Bank of Commerce,
472 U.S. 713 (1985).....7

United States v. Peters,
153 F.3d 445 (7th Cir. 1998).....12

STATE CASES

Bremer v. Weeks,
85 P.3d 150 (Haw. 2004) 10

Foytik v. Chandler,
966 P.2d 619 (Haw. 1998) 10

STATUTES

26 U.S.C. § 301 ..... 1, 6, 11, 12, 13, 15

26 U.S.C. § 316 ..... 2, 6, 12, 13, 15

26 U.S.C. § 7201 ..... 4, 13

26 U.S.C. § 7206(2) 4, 13

PETITION FOR A WRIT OF CERTIORARI

Michael Boulware petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-14) is reported at 470 F.3d 931. The court of appeals' order denying Boulware's petition for rehearing (App. 63) is unreported. The district court's jury instructions and oral rulings (App. 15-26) are unreported. The court of appeals' ruling on Boulware's first appeal (App. 27-62) is reported at 384 F.3d 794.

JURISDICTION

The court of appeals entered judgment on December 13, 2006. App. 1. The court denied a timely petition for rehearing on April 23, 2007. App. 63. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301 of Title 26, United States Code, provides in relevant part:

> (a) In general. Except as otherwise provided in this chapter, a distribution of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c).

. . . .

(c) Amount taxable. In the case of a distribution to which subsection (a) applies--

(1) Amount constituting dividend. That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

(2) Amount applied against basis. That portion of the distribution which is not a dividend shall be applied against and reduce the adjusted basis of the stock.

(3) Amount in excess of basis.

(A) In general. . . . [T]hat portion of the distribution which is not a dividend, to the extent that it exceeds the adjusted basis of the stock, shall be treated as gain from the sale or exchange of property.

. . . .

Section 316 of Title 26, United States Code, provides in relevant part:

(a) General rule. For purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders--

(1) out of its earnings and profits accumulated after February 28, 1913 . . . .

. . . .

> Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection.

STATEMENT OF THE CASE

Petitioner Michael Boulware founded Hawaiian Isles Enterprises ("HIE") in the 1980s and served as chairman and president of the company. HIE and its subsidiaries sell coffee, bottled water, and other products. At all relevant times, Boulware owned a substantial portion of the HIE stock.

Over a period of years beginning in 1987, Boulware transferred approximately $4.5 million from HIE to his girlfriend, Jin Sook Lee. In 1994, Lee sued Boulware and HIE in Hawaii state court, claiming that they had improperly obtained money and property from her. Boulware and HIE counterclaimed, seeking a declaration that Lee did not receive the $4.5 million from Boulware as a gift and a judgment that she held the money in constructive trust for HIE. App. 33-36. After a trial on the merits, the jury found that the monies were not gifts and belonged to HIE. App. 35-36. Similarly, "in deciding the equitable issues of unjust enrichment and constructive trust, the state court judge found by clear and convincing evidence that the monies were not gifts to Lee." App. 36. The state judge also found that the $4.5 million "[is] the property of [HIE] which has been and

is being held in constructive trust by [Lee] . . . ." App. 36 (quoting state court judgment).

In 2001, the government obtained an indictment against Boulware, charging him with tax evasion and tax perjury. *See* 26 U.S.C. §§ 7201, 7206(2).[1] The tax counts alleged that Boulware failed to report as income approximately $10 million that he allegedly diverted from HIE, including the $4.5 million at issue in the state court counterclaim. ER 23, 521.[2] The government contended at trial that Boulware had converted the $4.5 million that he transferred to Jin Sook Lee and that the money thus constituted income to him. Boulware countered that the funds belonged at all times to HIE and that Lee had received the money to hold in trust for the company. To support this position, Boulware sought to use the state court judgment establishing that the funds belonged to HIE. The district court refused to give the judgment binding effect and excluded it from evidence.

Following a guilty verdict, a panel of the Ninth Circuit reversed Boulware's conviction. The court held that the district court erred in excluding the state court judgment. App. 33-52. Although the court of appeals reversed Boulware's tax convictions on this basis, it declined to give binding effect to the Hawaii court's determination that the $4.5 million belonged to HIE, because (according to the court) "the ownership of the money as between Boulware and HIE does not appear to have been subject to adversarial testing." App. 42.

---

[1] The indictment also charged Boulware with making false statements to a federally insured financial institution and conspiracy to make false statements. Those charges are not at issue here.

[2] The Excerpts of Record from the court of appeals are cited as "ER." The Appendix to this petition is cited as "App."

At the retrial, the district court admitted the Hawaii judgment into evidence. The court instructed the jury that "[t]he state court judgment received into evidence determined that the money that the defendant transferred to his girlfriend, Jin Sook Lee, was not a gift, and remained the property of Hawaiian Isles Enterprises." App. 25. But the court added, over Boulware's objection, ER 807-09, that "[t]hat determination is not binding on you," App. 25. The instruction thus left the jury free to disregard the state court judgment that $4.5 million of the funds at issue belonged to HIE. The government emphasized this point in its rebuttal argument; it told the jury that the state court judgment "doesn't determine anything at all for you, ladies and gentlemen." Tr., Vol. 10, at 200.

As part of his defense at the retrial, Boulware sought to negate the "tax deficiency" and false statement elements of the tax evasion and tax perjury charges by presenting evidence that the money he received from HIE constituted nontaxable returns of capital he had invested in the company. ER 259, 369, 372, 540-48, 608, 629-30. Citing *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), the district court concluded that, to obtain admission of the evidence, Boulware had to show that the corporate distributions were intended as returns of capital at the time they were made. Because Boulware could not make this showing, the court precluded his evidence and refused to give a return of capital jury instruction. *E.g.*, App. 16-18, 21-23.

The jury found Boulware guilty. The district court sentenced him to 60 months incarceration. He appealed.

On December 13, 2006, the court of appeals affirmed Boulware's conviction and sentence. Because Boulware's proffered evidence in support of his return of capital defense did not satisfy the *Miller* contemporaneous intent

requirement, the court concluded that the district court did not err in excluding that evidence and in refusing to instruct on the defense. App. 3-6. The court recognized that under *Miller* the return of capital rule applies differently in criminal cases than in civil cases. It also acknowledged that its approach conflicts with decisions from the Second Circuit. App. 5-6. Concurring, Judge Thomas observed that if the panel were "writing on a clean slate, rather than under the controlling precedent of [*Miller*], I would adopt the approach of the Second Circuit concerning the return to capital defense." App. 13.

The court of appeals also reaffirmed its view that the state court judgment that the $4.5 million belonged to HIE was not entitled to binding effect and thus that the district court's instruction on the judgment was not error. App. 11-12. The court denied a timely petition for rehearing en banc on April 23, 2007. App. 63.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve two unsettled issues that are critical to the administration of the tax laws, particularly in criminal cases: (1) the effect of a final, non-collusive state court judgment adjudicating ownership of property on the determination of a taxpayer's income tax liability for that property, and (2) whether a taxpayer who seeks to invoke the return of capital rule in a criminal tax case must show a contemporaneous intent to treat the corporate distribution at issue as a return of capital, as the Ninth Circuit held here and in *Miller*, or merely meet the statutory requirements under 26 U.S.C. §§ 301 and 316, which do not include contemporaneous intent, as the Second Circuit holds.

I. THE COURT SHOULD GRANT THE WRIT TO CLARIFY THE EFFECT OF STATE COURT JUDGMENTS IN FEDERAL TAX CONTROVERSIES.

This Court has held that "federal income tax liability follows ownership," and "[i]n the determination of ownership, state law controls." *United States v. Mitchell*, 403 U.S. 190, 197 (1971); *see also, e.g., United States v. National Bank of Commerce*, 472 U.S. 713, 722 (1985) (noting that "state law controls in determining the nature of the legal interest which the taxpayer had in the property"); *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960) (in determining whether a taxpayer had property or right to property to which federal tax lien could attach, a federal court "must look to state law, for it has long been the rule that in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute") (quotation omitted).

Although these cases establish that state *law* controls the determination of ownership in federal tax cases, the effect of state court *judgments* is less clear. This Court has left no doubt that a federal court deciding a tax case must give controlling effect to a decision of the highest court of a state resolving the property rights at issue. *See Commissioner v. Bosch*, 387 U.S. 456, 465 (1967). But the effect of a decision by a lower state court is unclear. In *Blair v. Commissioner*, 300 U.S. 5 (1937), the Court declared that a ruling by an intermediate state appellate court on issues relating to a trust "is final" in a federal tax case. *Id.* at 8-9. And in *Freuler v. Commissioner*, 291 U.S. 35 (1934), the Court found that the decision of a state trial court, "until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a

declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them." *Id.* at 45.

These cases seem to give decisive effect for federal tax purposes to non-collusive state court judgments adjudicating rights in property. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), however, clouds the picture. Although *Bosch* affords decisive effect to rulings of a state's *highest* court, it declares that federal courts should merely give "proper regard" to decisions of *lower* state courts. *Id.* at 464-65. The Court oberved that "if there be no decision by [the state's highest court] then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." *Id.* at 465.[3] *Bosch* did not explain how much deference, if any, "proper regard" for a lower state court decision entails.

Bosch appears to turn on the legislative history of the estate tax provision at issue and to be limited to that specific context. *See id.* at 464. Nevertheless, the lower federal courts have expressed uncertainty about how broadly its rule sweeps. The Fifth Circuit, for example, observed that "[t]he precise scope and meaning of *Bosch* as applied in dissimilar contexts is difficult for us to ascertain." *Estate of Warren v.*

[3] Somewhat inexplicably, *Bosch* observed: "It may be claimed that *Blair v. Commissioner*, 300 U.S. 5 (1937), dealt with the problem presently before us but that case involved the question of the effect of a property right determination by a state appellate court." *Bosch*, 387 U.S. at 462 n.3. But *Blair* involved a decision by the Appellate Court of Illinois--an intermediate appellate court, below the Illinois Supreme Court--and the decree in the case was entered, under mandate from the Appellate Court, by a state trial court. *See Blair*, 300 U.S. at 8-10. Thus, *Bosch* and *Blair* appear to conflict.

Commissioner, 981 F.2d 776, 781 (5th Cir. 1993); *see, e.g., Estate of Delaune v. United States*, 143 F.3d 995, 1001 (5th Cir. 1998) (referring to the "rather ambivalent majority opinion in *Bosch*"). Similarly, the Ninth Circuit, in deciding Boulware's first appeal, noted that "[w]hat effect, if any, *Bosch* has outside the context of the estate tax statute is unclear." App. 40.

This case provides an opportunity for the Court to clarify the scope of *Bosch*. As noted above, "federal income tax liability follows ownership," and "[i]n the determination of ownership, state law controls." *Mitchell*, 403 U.S. at 197. Here, a final state court judgment, obtained through an adversarial, non-collusive trial, squarely determined that HIE owned money that the government claimed Boulware should have reported as personal income. If *Freuler* and *Blair* control, the state judgment precludes prosecution of Boulware for failing to pay taxes on the money and to report it as income. If *Bosch* controls, by contrast, the judgment is entitled only to "proper regard," whatever that phrase may be determined to mean. The Court should resolve the tension between these two lines of cases.

The Ninth Circuit rested its refusal to give the state court judgment conclusive effect on its observation that "the ownership of the money as between Boulware and HIE does not appear to have been subject to adversarial testing." App. 42. But this rationale raises further unresolved questions under *Freuler*, *Blair*, and *Bosch*. As the Fifth Circuit has noted, federal courts have given controlling effect in some settings even to "bona fide settlements of adversarial litigation not instituted for tax purposes." *Estate of Warren*, 981 F.2d at 781. It is hard to see why the fully litigated judgment in the state court action among Boulware, HIE, and Lee should receive any less effect than a settlement, even if

Boulware and HIE did not expressly litigate the ownership of the funds as between each other.

Moreover, the court of appeals ignores the significance of Hawaii principles of claim preclusion. Boulware and HIE were both parties to the state court proceeding. Under Hawaii law, "the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, *but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.*" *Bremer v. Weeks*, 85 P.3d 150, 160 (Haw. 2004) (emphasis added); *see, e.g., Foytik v. Chandler*, 966 P.2d 619, 626 (Haw. 1998) (same). Because any claim of ownership Boulware had against HIE concerning the $4.5 million "might have been properly litigated" in the state court action with HIE and Lee, Boulware cannot challenge the judgment that the money belongs to HIE. The judgment in favor of HIE thus conclusively determines the property rights in the $4.5 million not only between HIE and Lee, but also between HIE and Boulware. Just as Boulware cannot obtain the benefits of HIE's $4.5 million, he should not be held responsible, criminally or civilly, for not paying federal income tax on that money.

Even if the Court were to agree with the court of appeals that *Bosch* controls under these circumstances, rather than *Frueler* and *Blair*, it should clarify the "proper regard" that the federal court must show to the lower state court judgment. The district court's instructions simply told the jury that the state court determination that the funds remained the property of HIE "is not binding on you." App. 25. The instruction did not require the jury to give "proper regard" to the state judgment, much less explain how much

deference the "proper regard" standard mandates. Nor did either the district court or the court of appeals perform the task that *Bosch* appears to contemplate: to "sit[] as a state court" and predict how the Hawaii Supreme Court would decide the ownership issue under state law. 387 U.S. at 465.

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE RETURN OF CAPITAL RULE.

The Court should also grant the writ to resolve the split between the Second and Ninth Circuits over the application of the return of capital rule in criminal cases.

As the court of appeals recognized, "an essential element of the crime of tax evasion is the existence of a tax deficiency." App. 3. To prove the tax evasion charges, therefore, the government had to establish that Boulware owed taxes based on income he failed to report. Similarly, to prove the tax perjury charges, the government had to show that Boulware falsely understated his income. App. 53. Under the government's theory, the unreported income at issue on all counts consisted of money Boulware obtained from HIE. *E.g.*, ER 495-520.

To negate the "tax deficiency" and false statement elements of the charges, Boulware sought to establish that the money he received from HIE constituted returns of the capital he had infused into the company. When a corporation without earnings or profits distributes funds to a shareholder, the distribution is a nontaxable return of capital, up to the shareholder's basis in his stock. *See, e.g., United States v. Bok*, 156 F.3d 157, 162 (2d Cir. 1998); *United States v. D'Agostino*, 145 F.3d 69, 72-73 (2d Cir. 1998). The United States Tax Court recognized this principle in *Truesdell v. Commissioner*, 89 T.C. 1280, 1294-95 (1987).

The return of capital rule follows directly from the relevant provisions of the Internal Revenue Code. Section 301(a) of Title 26 declares that distributions by a corporation to a shareholder with respect to its stock "*shall*" be treated as provided in § 301(c), with exceptions not applicable here. 26 U.S.C. § 301(a) (emphasis added). Section 301(c) divides corporate distributions into dividends (as defined in 26 U.S.C. § 316), which are taxable as ordinary income, and non-dividends, which are taxable as capital gains to the extent they exceed the taxpayer's basis in his stock but are otherwise nontaxable. 26 U.S.C. § 301(c). Section 316 defines dividends as any distribution by a corporation to a shareholder "out of its earnings and profits." 26 U.S.C. § 316. Read together, these statutes establish that when a corporation without earnings or profits distributes funds to a shareholder up to the shareholder's basis in his stock, the distribution is a nontaxable return of capital. *See Bok*, 156 F.3d at 162.

In accordance with this rule, Boulware proffered expert and lay testimony that for the years at issue HIE had no earnings or profits and the money Boulware received constituted a nontaxable return of capital. *E.g.*, ER 369, 372, 540-48, 608, 629-30. Boulware also requested a return of capital jury instruction that correctly stated the principles outlined above. ER 259.

The district court prohibited Boulware from presenting evidence to support his return of capital defense. Relying on *Miller*, the court declared that "[t]he defendant must not show merely that the funds could have been a return of capital; he must introduce evidence showing that, at the time of the transfer, the funds were, in fact, a return of capital." App. 21; *see* App. 18 ("[I]f the constructive dividend rules are to apply, the defendant must make the requisite showing that the distributions were intended to be a

return of capital."). Thus, the court required a showing of intent on the part of Boulware or HIE *at the time of the distributions* to treat them as returns of capital. Because the court found that Boulware's proffer did not meet this contemporaneous intent standard, it barred him from presenting any supporting evidence, *e.g.*, App. 21-23; ER 746, and it refused to instruct the jury on the return of capital defense.

The court of appeals affirmed. It declared that "[l]ike the defendant in *Miller*, Boulware 'presented no concrete proof that the amounts were considered, intended, or recorded on the corporate records as a return of capital at the time they were made.'" App. 6 (quoting *Miller*, 545 F.2d at 1215).

The court of appeals' holding, like *Miller* itself, ignores the plain terms of 26 U.S.C. §§ 301 and 316. These statutes make clear that a corporate distribution to a shareholder not out of earnings and profits is nontaxable to the extent of the taxpayer's basis in the stock. *See, e.g., Bok*, 156 F.3d at 162. Sections 301 and 316 turn entirely on objective circumstances--whether the corporation had earnings or profits for the year in question and the taxpayer's basis in his stock. The statutes say nothing about the intent of the corporation or the taxpayer at the time of the distribution. The *Miller* court invented this requirement out of whole cloth.

As Judge Thomas recognizes in his concurrence, the *Miller* contemporaneous intent requirement produces an illogical anomaly: corporate distributions that do not count as income for civil tax purposes under the return of capital rule *do* count as income for purposes of the tax evasion and tax perjury statutes. App. 13-14. Thus, under the Ninth Circuit's approach, a shareholder who has no income under

26 U.S.C. § 301(c) and *Truesdell* and who therefore has no tax liability could nevertheless be found to have a "tax deficiency" under 26 U.S.C. § 7201 and to have falsely reported his (nonexistent) income under 26 U.S.C. § 7206(2). In other words, in the civil setting, a corporate distribution is a nontaxable return of capital, regardless of the intent of the taxpayer and the corporation at the time of the distribution, as long as the corporation has no earnings or profits and the distribution does not exceed the taxpayer's basis in his stock. But according to the Ninth Circuit, that same distribution constitutes taxable income for purposes of a criminal prosecution unless the taxpayer can show that, at the time of the distribution, he and the corporation intended a return of capital. Thus, the contemporaneous intent requirement "result[s] in a logical fallacy, [and] is in flat contradiction with the tax evasion statute's requirement of 'the existence of a tax deficiency.'" App. 13-14 (Thomas, J., concurring).

The court of appeals' decision conflicts squarely with the Second Circuit's decisions in *Bok* and *D'Agostino*. Those cases hold that

> in return of capital cases . . . the taxpayer or the corporation *need not have described the distribution at issue as a dividend or a return of capital at the time it was made*; rather, the realities of the transaction--including the amount of the shareholder's basis and the corporation's earnings or profits, as well as the amount of the distribution--govern its characterization for tax purposes.

Bok, 156 F.3d at 162 (citing *D'Agostino*, 145 F.3d at 72-73) (emphasis added).[4] As Judge Thomas concludes in his concurrence, "the Second Circuit's analysis is more consistent with the statutory requirements of criminal tax evasion." App. 13.

Although Judge Thomas rejects the *Miller* contemporaneous intent requirement, he concludes that applying the return of capital rule here would not affect the outcome of this case. App. 14. We respectfully disagree.

First, Judge Thomas contends that the return of capital rule does not apply if the diversion of funds from the corporation was unlawful. App. 14. It is far from clear that this is correct; the relevant statutes (26 U.S.C. §§ 301 and 316) say nothing about the lawfulness of the corporate distribution. But even if such an exception to the return of capital rule exists, it has no bearing here. Judge Thomas asserts that "[b]ecause Boulware claimed that the diversions were made to defraud his ex-wife from her share of property in the divorce proceedings, these diversions may be properly considered unlawful." App. 14 (citing *Boulware*, 384 F.3d at 801). But the language Judge Thomas cites from *Boulware* does not support a finding that Boulware obtained the money from HIE to defraud his ex-wife, or even that he "claimed" to have done so.[5] The district court made no finding that the distributions from HIE to Boulware were for that purpose, and the government never argued before the panel on appeal that the distributions were unlawful. And even if there were record support for Judge Thomas' contention, whether a

[4] *See also United States v. Peters*, 153 F.3d 445, 460-61 (7th Cir. 1998) (noting split in circuits over return of capital defense).

[5] Judge Thomas apparently cites to allegations in the Hawaii state court counterclaim that Boulware and HIE brought against Jin Sook Lee. But nothing in those allegations supports the proposition that Boulware diverted money from HIE to defraud his ex-wife.

corporate distribution can be considered unlawful so as to defeat the return of capital rule is a question of fact that the court of appeals should not decide in the first instance; the proper approach would be to remand for appropriate fact-finding in the district court.

Second, Judge Thomas asserts that the fact that Boulware was not the sole shareholder of HIE would "likely preclude him from asserting a return to capital defense." App. 14. In support of this contention, Judge Thomas notes that the courts in *Truesdell* and *Bok* applied the return of capital rule to distributions to sole shareholders. But 26 U.S.C. § 301(a) addresses distributions by a corporation to *a shareholder*, not distributions by a corporation to *the sole shareholder*. Nothing in *Truesdell* or *Bok* suggests that the return of capital rule is limited to sole shareholders. *See, e.g., Bok*, 156 F.3d at 162 ("We have long recognized that under certain circumstances monies lawfully withdrawn from a corporation by *one of its shareholders* may constitute a non-taxable return of capital." (citations omitted; emphasis added)). Contrary to Judge Thomas' view, therefore, overruling the *Miller* contemporaneous intent requirement in favor of the return of capital rule in *Bok* and *D'Agostino* would directly affect Boulware's case.

For these reasons, this case provides an appropriate vehicle for the Court to resolve the split between the Second and Ninth Circuits over the proper application of the return of capital rule in criminal tax cases. The Court should grant the writ and overrule the erroneous and illogical application of that rule in *Miller* and by the court of appeals below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Jones Day
555 California St., 26th Floor
San Francisco, CA 94104
(415) 626-3939
Counsel for Petitioner
Michael H. Boulware

May 2007

470 F.3d 931

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MICHAEL H. BOULWARE, *Defendant-Appellant*.	No. 05-10752 D.C. No. CR-99-00239-ER Opinion

Appeal from the United States District Court
for the District of Hawaii
Edward Rafeedie,* Senior District Judge, Presiding

Argued and Submitted
October 16, 2006 – San Francisco, California

Filed December 13, 2006

Before: Pamela Ann Rymer and Sidney R. Thomas,
Circuit Judges, and Stephen G. Larson,** District Judge

Opinion by Judge Rymer;
Concurrence by Judge Thomas

COUNSEL

John D. Cline, Jones Day, San Francisco, California, for the defendant-appellant.

---

* The Honorable Edward Rafeedie, Senior District Judge for the Central District of California, sitting by designation.

** The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.

Alan Hechtkopf (signed the brief) and Karen M. Quesnel, Department of Justice, Tax Division, Washington, D. C., for the plantiff-appellee.

OPINION

RYMER, Circuit Judge.

In a return trip following retrial after we reversed his first conviction, *United States v. Boulware*, 384 F.3d 794 (9th Cir. 2004) (*Boulware I*), Michael H. Boulware appeals his conviction and sentence for filing a false tax return in violation of 26 U.S.C. § 7206(1), tax evasion in violation of 26 U.S.C. § 7201, and conspiracy to make a false statement to influence a financial institution in violation of 18 U.S.C. § 1014. We conclude there is no reversible error, and affirm.

I

Without belaboring the background recited in our prior opinion, Boulware is the founder, former President, and majority owner of a closely held corporation, Hawaiian Isles Enterprises (HIE). HIE dealt in tobacco distribution, coffee processing and sales, arcade games, vending machines, and bottled water. A second superceding indictment charged Boulware with thirteen (later reduced to nine) counts of tax evasion and tax fraud in connection with his failure to report funds diverted from HIE as income for the years 1989-97; one count of conspiracy to make a false statement to influence a financial institution in connection with HIE's use of false invoices in applying for a loan from GECC Finance Corporation; and four counts of making a false statement to influence a financial institution in connection with the false invoices. Boulware

was convicted on the tax counts and the conspiracy count, which we reversed on the ground that the district court had erroneously excluded evidence of a Hawaii state court's adjudication of property rights in certain funds diverted from HIE. *Boulware I,* 384 F.3d at 800-09. On retrial as originally, the government's theory was that during the period 1989-1997, through a number of different devices, Boulware diverted more than $10 million from HIE and failed to report or pay taxes on this income; and that he used fraudulent invoices in applying for a bank loan. He was convicted on all counts. The district court again sentenced Boulware to 36 months' imprisonment on the false return counts, but increased the sentence from 51 to 60 months on the tax evasion and conspiracy counts, all to run concurrently.

Boulware timely appeals.

II

Boulware first claims that the district court erred in excluding evidence that he contends would have shown that the funds he took from HIE were nontaxable returns of capital rather than income. An essential element of the crime of tax evasion is the existence of a tax deficiency. *Boulware I,* 384 F.3d at 810. However, for purposes of civil tax liability, when a distribution from a corporation to its shareholder constitutes a return of capital, that distribution is normally not taxable. 26 U.S.C. §§ 301, 306; *United States v. Miller,* 545 F.2d 1204, 1210-12 & n.5 (9th Cir. 1976). Hence, to negate the tax deficiency element, Boulware sought to show that the money he received from HIE constituted returns of the capital he had invested as the corporation was, at the time, without earnings or profits.

The government moved in limine to preclude a "return of capital" defense, relying on *Miller*. There, we held that constructive distribution rules applicable in the civil arena could not be automatically applied to a criminal tax matter in the absence of some demonstration on the part of the defendant or corporation that distributions were intended to be a return of capital. *Id.* at 1214-15. In response, Boulware argued that whether corporate funds could be characterized as a return of capital is a question of fact for the jury, and he proffered testimony of an expert who would explain that if the monies transferred from HIE to Boulware were not loans or advances, or if Boulware did not use those funds for corporate purposes, then the transfer could be deemed a constructive dividend or return of capital to Boulware which may or may not be income to him depending upon whether HIE had earnings and profits for the years when the transfers occurred. The district court ruled that this offer of proof did not meet the *Miller* threshold because the defendant must show not merely that the funds *could* have been a return of capital, but that the funds were *in fact* a return of capital at the time of the transfer.

Boulware contends that the district court misread *Miller*. In his view, the issue in *Miller* was whether the evidence was sufficient to convict the taxpayer in spite of his return of capital defense, not whether the taxpayer had made a sufficient initial showing to introduce evidence pertaining to that defense; thus, the rest of *Miller* – upon which the district court relied – is dicta. We disagree that any part of *Miller's* reasoning can be disregarded. *See Barapind v. Enomoto,* 400 F.3d 744, 750-51 (9th Cir. 2005) (holding that what a majority opinion says regarding an issue presented for review is the law of the

circuit, regardless of whether or not it is "in some technical sense 'necessary' to the disposition in the case"). Boulware concedes that *Miller* controls if this is so. Accordingly, his alternative position that imposing an intent requirement creates a disconnect between civil and criminal liability necessarily fails. We held in *Miller* that the characterization of diverted corporate funds for civil tax purposes does not dictate their characterization for purposes of a criminal tax evasion charge; rather, the appropriate characterization for criminal purposes is whether the defendant has willfully attempted to evade the payment or assessment of a tax. 545 F.2d at 1214. As we explained, "[w]here the taxpayer has sought to conceal income by filing a false return, he has violated the tax evasion statutes. It does not matter that that amount could have somehow been made non-taxable if the taxpayer had proceeded on a different course." *Id.* Boulware's reliance on *Truesdell v. Commissioner,* 89 T.C. 1280 (1987), where the U.S. Tax Court held that funds diverted from a corporation in excess of earnings and profits were returns of capital, is misplaced because *Truesdell* was a civil proceeding and thus inapposite given *Miller's* explicit holding that civil classifications of diverted corporate funds do not control in criminal cases. *See also United States v. Williams,* 875 F.2d 846, 849-52 (11th Cir. 1989) (approving *Miller* despite *Truesdell* and distinguishing between civil and criminal contexts); *United States v. Schmidt,* 935 F.2d 1440, 1446 (4th Cir. 1991) (noting that "[t]he important distinction between civil and criminal tax cases concerning the key element to be focused upon is compellingly set out in [*Miller*].").

Boulware also posits that requiring a defendant in a criminal case to show that a distribution was intended to

be a return of capital unconstitutionally shifts the burden of proof to the defendant, but again, we held in *Miller* and *Boulware I* that once the government has shown that the taxpayer diverted funds from the corporation and failed to report them, the burden shifts to the taxpayer to show that the funds constituted a return of capital. *Boulware I,* 384 F.3d at 811 (citing *Miller,* 545 F.2d at 1215 & n.13). Like the defendant in *Miller,* Boulware "presented no concrete proof that the amounts were considered, intended, or recorded on the corporate records as a return of capital at the time they were made." *Id.* at 1215. Nor were any adjustments made to HIE's books showing a return of capital to Boulware, or to his co-shareholder. *See id.* at 1214 n.12. Accordingly, the district court properly required a foundation to be laid before allowing the asserted defense to go forward, and properly rejected Boulware's proffer as inadequate.

Finally, Boulware points out that accepting the district court's interpretation of *Miller* puts us in conflict with the Second Circuit, which has held that a taxpayer need not show that the distribution was characterized as a return of capital at the time of the transaction. *See United States v. D'Agostino,* 145 F.3d 69, 72-73 (2d Cir. 1998); *United States v. Bok,* 156 F.3d 157, 162 (2d Cir. 1998) (holding that a showing that a corporation had no earnings and profits is sufficient to support a return of capital defense, but acknowledging that this is a departure from the prevailing view among federal courts). Whether or not the facts in this case would implicate the Second Circuit's rule, which is by no means certain, we are satisfied that the district court correctly interpreted and applied *Miller* by which it, and we, are bound.

III

Secondly, Boulware challenges exclusion of evidence that he believes would have shown that HIE overpaid tobacco taxes and was simply making up for the overpayment by under-reporting income. The district court sustained a relevance objection to testimony by Boulware's attorney regarding advice he had given Boulware about payment of these taxes, and to testimony by HIE's controller regarding tax adjustments made on HIE's books. Boulware himself, however, was allowed to testify that HIE had been overpaying its tobacco taxes and had tried to recoup these overpayments by underpaying in subsequent periods and adjusting its books accordingly. He admitted that this was "self-help," and testified that he did not understand the increase in HIE's income to have any effect on his own taxes.

We discern no error. Boulware failed before the district court to link the excluded testimony about HIE's tobacco taxes to his personal income taxes, and fares no better before us. His suggestion that tobacco tax evidence was probative of intent lacks factual or legal support. In any event, nothing about it indicates that Boulware did not have income that he failed to report on his personal return. Although the court allowed some exploration of the subject at Boulware's behest, it retained discretion to curtail the extent of it. As the subject itself lacked relevance, the court likewise properly refused to read HRS 245-7 to the jury; whether or not HIE's method of tax recovery was legal under state law had no bearing on whether Boulware was guilty of federal tax evasion or tax fraud.

IV

Boulware next asserts that the court's receipt of a summary exhibit categorizing and organizing a series of schedules listing each financial transaction pertaining to his taxable income over the relevant period offended Rule 1006 of the Federal Rules of Evidence. The government introduced the compilation (Exhibit 3300) through its summary witness, IRS Agent Randall Tanahara. Boulware objected on the ground that Exhibit 3300 was cumulative and not allowed of a summary witness. The court overruled the objection. Later, Boulware moved to strike the exhibit on the ground that it merely summarized evidence already in the record, which the court denied. Boulware did not (and does not) dispute the accuracy of the information contained in the schedules. The jury was instructed that charts and summaries are only as good as the underlying supporting material admitted into evidence, and that the jury should give them only such weight as it thinks the underlying material deserves.

Boulware relies on *United States v. Wood,* 943 F.2d 1048 (9th Cir. 1991), *United States v. Soulard,* 730 F.2d 1292 (9th Cir. 1984), and *United States v. Abbas,* 504 F.2d 123 (9th Cir. 1974), as articulating a bright-line rule against admission of summary charts as evidence. There is no question that, as *Wood, Soulard,* and *Abbas* indicate, we do not approve of receiving summary exhibits of material already in evidence; however, in none of these cases did we reverse for this reason. Moreover, we have elsewhere recognized a district court's discretion under Fed.R.Evid. 611(a) to admit summary exhibits for the purpose of assisting the jury in evaluating voluminous evidence. *See, e.g., United States v. Poschwatta,* 829 F.2d 1477, 1481 (9th Cir. 1987) (holding that admission of a

chart summarizing income figures already admitted into evidence, while perhaps not the best practice, was not an abuse of discretion); *United States v. Gardner,* 611 F.2d 770, 776 (9th Cir. 1980) (holding that admission of a chart summarizing the defendant's financial status was well within the discretion of the trial court pursuant to Fed.R.Evid. 611(a)). Here, the court no doubt believed that it would be helpful to have the voluminous financial materials reduced to summary form (even though, as it happens, the summary was 116 pages long). Nevertheless, we do not need either to embrace or condemn the procedure followed in this case because, even if it were error to allow the summary exhibit into evidence, the error is harmless given admissibility of the underlying data, lack of objection to accuracy of the summary, and the limiting instruction. *See United States v. Krasn,* 614 F.2d 1229, 1238 (9th Cir. 1980) (holding that charts should not have been admitted, but that it was harmless error as the defendant had an opportunity to challenge the facts and data upon which the charts were based and the court gave a limiting instruction); *Gardner,* 611 F.2d at 776 (noting the defendant's opportunity to cross-examine the government witness who prepared the chart and finding no reversible error in admission of chart); *Abbas,* 504 F.2d at 125 (same).

V

The government questioned Boulware during cross-examination about a letter that he had written to his girlfriend, Jin Sook Lee, soon after divorcing his wife in 1994. The letter referred to gifts Boulware had bought for Lee, including a diamond that he testified was purchased with a credit card. The letter was not received into

evidence. A 1991 invoice with the name "Gina Lee" reflecting sale of a 5.03 carat diamond for $70,000 was in evidence; this purchase was evidently by cashier's check. The Assistant United States Attorney (AUSA) argued in closing that, based on his recollection, Boulware had "lied to you during the course of this case" about how he bought the diamond and that if he would lie about how he bought a diamond for $70,000, he would lie about how he got $10 million. The day after closing arguments were concluded, Boulware moved for a mistrial, or alternatively, for an instruction about the government's misstatement. The court denied both requests. It found that the AUSA simply made a mistake in good faith and that, assuming the argument was improper, it was not prejudicial because it was but a single part of an extensive litany of evidence showing Boulware's lack of veracity, it had to do with a fifteen-year old event, and the AUSA stated that he was only relating his own recollection.

Even if the AUSA's recollection – thus his statement to the jury – were incorrect, the district court did not clearly err in its findings or abuse its discretion in denying Boulware's requests. The inaccuracy of the AUSA's characterization was not immediately apparent, and the record was somewhat ambiguous given references to different diamond purchases. Regardless, it is unlikely that the statements materially affected the trial. The jury was instructed that statements of counsel are not evidence, and that the jury's recollection of the evidence controls. *See United States v. Kerr,* 981 F.2d 1050, 1053 (9th Cir. 1992) (observing that "[t]o determine whether the prosecutor's misconduct affected the jury's verdict, we look first to the substance of a curative instruction."). The point was but one of many made in closing about Boulware's

credability. And the evidence against Boulware was strong. *See United States v. Weatherspoon,* 410 F.3d 1142, 1151 (9th Cir. 2005) (noting importance of the strength of the case against a defendant in measuring prejudicial effect of improper statements).

VI

We reversed Boulware's first conviction because the district court had erroneously excluded evidence of a state court judgment establishing that money Boulware had taken from HIE and given to Lee was not a gift to her, but rather belonged to HIE and was being held in trust by Lee. *Boulware I,* 384 F.3d at 798, 800. Although we held that the judgment was relevant, we also rejected Boulware's argument that it was controlling on the issue of whether the money held by Lee belonged to HIE and was therefore not taxable to him. The district court on retrial received the state court judgment into evidence, but it instructed the jury that the state court judgment determined that the money that Boulware transferred to Lee remained the property of HIE; that this determination was not binding on the jury; but that the judgment could be considered in determining the purpose of the transfer and whether it constituted unreported income to Boulware.

Boulware now maintains that the state court judgment resolving the property dispute between Lee and HIE is binding on the federal courts and, additionally, that *Boulware I* was wrong in concluding otherwise. However, *Boulware I* is the law of the case, and controlling. *Jeffries v. Wood,* 114 F.3d 1484, 1489 (9th Cir. 1998) (en banc). Under our mandate, "the district court did not err in ruling that the state court judgment does not have preclusive effect as

to the ownership of the monies." *Boulware I,* 384 F.3d at 805. The court's instructions on remand were faithful to *Boulware I,* and thus were not erroneous.

VII

Boulware's press for reversal based on cumulative error fails as there is no accumulation.

VIII

Boulware raises two issues with respect to his sentence. First, he contends that the court's imposing a 60-month term of custody on the tax evasion and conspiracy counts is vindictive given that his original sentence on these counts, before reversal, was to 51 months. We disagree. Different evidence was adduced upon retrial. For example, Nathan Suzuki testified about Boulware's continuing fraudulent activities even after he knew about the government's investigation. Additional evidence could lead the district judge to find that an increased sentence was objectively justified. *Wasman v. United States,* 468 U.S. 559, 565 (1984).

Additionally, Boulware argues that his sentence of 60 months on the conspiracy conviction is unreasonable and must be vacated if the tax counts are reversed. As we affirm conviction on the tax counts, the premise of Boulware's challenge to the conspiracy sentence disappears.

AFFIRMED.

THOMAS, Circuit Judge, concurring:

I agree entirely with the analysis and conclusions of the majority. I write separately only to comment that if we were writing on a clean slate, rather than under the controlling precedent of *United States v. Miller,* 545 F.2d 1204, 1211-15 (9th Cir. 1976), I would adopt the approach of the Second Circuit concerning the return to capital defense. *See United States v. Bok,* 156 F.3d 157, 162 (2d Cir. 1998); *United States v. D'Agostino,* 145 F.3d 69, 72-73 (2d Cir. 1998).

I believe the Second Circuit's analysis is more consistent with the statutory requirements of criminal tax evasion. The elements of criminal tax evasion under 26 U.S.C. § 7201 are: "(1) the existence of a tax deficiency, (2) willfulness in attempted evasion of taxes, and (3) an affirmative act constituting an evasion or attempted evasion." *United States v. Marabelles,* 724 F.2d 1374, 1380 (9th Cir. 1984). Thus, an explicit requirement to impose liability under § 7201 is "the existence of a tax deficiency." As the majority opinion notes, notwithstanding a taxpayer's wrongful intent regarding diverted income, a sole shareholder of a company cannot be held civilly liable for any distribution that exceeds the earnings and profits of the corporation and that does not exceed the shareholders adjusted basis in the stock – instead such diversions are considered a return of the shareholder's capital investment. *Truesdell v. Commissioner,* 89 T.C. 1280, 1294-95, (T.C. 1987) (relying on 26 U.S.C. §§ 301, 306). *See also United States v. Miller,* 545 F.2d 1204, 1210-12 & n.5 (9th Cir. 1976). Thus, *Miller* – and now the majority opinion – hold that a defendant may be criminally sanctioned for tax evasion without owing a penny in taxes to the government. Not only does this result indicate a logical fallacy, but is in

flat contradiction with the tax evasion statute's requirement of "the existence of a tax deficiency." *Marabelles,* 724 F.2d at 1380. Therefore, without the constriction of *Miller,* I would hold that the Second Circuit approach to the return to capital defense is the better one, adopting the approach that "the return of capital theory applies equally in both criminal and civil cases, assuming the diversion itself was not unlawful." *Bok,* 156 F.3d at 162 (citing *D'Agostino,* 145 F.3d at 72-73).

I emphasize that even if we were to apply *Bok* and *D'Agostino* to the case at hand, the outcome would not be affected. *Bok* expressly holds that the return to capital defense does not apply if the diversion itself were unlawful. *Bok,* 156 F.3d at 162. More broadly, the Internal Revenue Service does not consider distributions to be a return to capital if made for unlawful purposes. *Truesdell,* 89 T.C. at 1298 (only permitting the return to capital defense after determining that the diversions "were not per se unlawful [,] . . . not, at least on their face, stolen, embezzled or diverted in fraud of creditors"). Because Boulware claimed that the diversions were made to defraud his ex-wife from her share of property in the divorce proceedings, these diversions may be properly considered unlawful. *United States v. Boulware,* 384 F.3d 794, 801 (9th Cir. 2004). In addition, the record indicates that Boulware was not a sole shareholder of HIE, which would also likely preclude him from asserting a return to capital defense. *See Truesdell,* 89 T.C. at 1282 (petitioner was president and sole shareholder of the company from which funds were diverted); *Bok,* 156 F.3d at 160 (similarly applying the return to capital defense in the context of a sole shareholder).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 99-00239ER
Plaintiff,	)	– VOLUME 5 –
vs.	)	
MICHAEL H. BOULWARE,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

The above entitled matter came on for hearing on Friday, July 1, 2005, at 9:11 a.m., at Honolulu, Hawaii

BEFORE: THE HONORABLE EDWARD RAFEEDIE
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

APPEARANCES: LESLIE E. OSBORNE, JR., ESQ.
U.S. Attorney's Office
300 Ala Moana Blvd., Suite 6100
Honolulu, Hawaii 96813

JARED E. DWYER, ESQ.
U.S. Department of Justice
Tax Division, P.O. Box 972
Washington, D.C. 20044

Attorneys for the Government

DENNIS E.W. O'CONNOR, ESQ.
KELVIN H. KANESHIRO, ESQ.
Reinwald O'Connor & Playdon
733 Bishop Street, 24th floor
Honolulu, Hawaii 96813

Attorneys for the Defendant

* * *

[160] and not to form or express any opinions or conclusions about this case until it has been submitted to you.

You are excused.

THE CLERK: All rise for the jurors.

(The jury was excused at 1:14 p.m.)

(The following proceedings were held in open court, outside the presence of the jury:)

THE COURT: I can think of no conceivable theory of admissibility for this group of documents labeled Exhibit 2010, because it is a conglomerate of things, including deposition testimony, including copies of checks, including statements of banks, etc.

So the court will – that will not be the last word.

If you file with me a justification to admit this under some pertinent evidentiary rule, I will consider it.

But, as of now, I'm not –

And you're the one that objected to it. You should file whatever objection that you have, other than your – other than that you don't like it.

MR. DWYER: Yes, Your Honor.

THE COURT: That is not a good objection. Which both sides have used.

Now, the other issue:

One other issue, that the government has filed a motion in limine to preclude the introduction of evidence

[161] relating to the issues of constructive distribution and return of capital.

This motion would prevent the defendant from arguing that monies diverted from Hawaiian Island to Boulware were actually a return of the defendant's capital investment in the company.

I want to quote to you now from a case, which I will cite in a moment:

"Evidence of unexplained funds in the taxpayer – of the tax – in the hands of the taxpayer establishes a prima facie case of understatement of income, making it incumbent on the taxpayer to overcome the logical inferences drawn from the facts proved," end quote, United States versus Garcia, 412 F.2d, 999, cited with approval by the Ninth Circuit in United States versus Miller, 545 F.2d, 1204.

Once the government had made out a prima facie case, in order for constructive distribution rules to apply, I quote again. This is from Miller.

Quote, "There must be some demonstration on the part of the taxpayer and/or the corporation that such distributions were intended to be such a return," end quote. Miller.

Now, as Miller held, it is not relevant whether the funds could have been classified as return of capital or a dividend at the time they were diverted.

There is a violation given where the diverted funds [162] could have qualified as a return of capital, when the taxpayer fails to report the money as income or record it as a return of capital on the corporate books.

Here, the government has made out the prima facie case required by Miller.

Thus, if the constructive dividend rules are to apply, the defendant must make the requisite showing that the distributions were intended to be a return of capital.

As the government points out, Mr. Manago, who was a witness, who was an employee of the defendant, has testified that there were no returns of capital during the years in question.

Unless the defendant introduces competent evidence that demonstrates otherwise, the constructive distribution rules would apply to this case – would not apply.

Because of the confusing and potentially prejudicial nature of this evidence, the court believes the matter should be resolved either in a hearing under Federal Rule of Evidence 104, which is to determine the existence of the preliminary facts necessary for admissibility, or if the defendant can make a showing by a written offer of proof, which the court will then consider in determining this issue.

So, what we will do is this:

We will probably hold a hearing.

I'll give you the choice. If you want to present [163] the evidence to the court outside the presence of the jury to demonstrate what I have just said, then I will consider that, and rule accordingly on the issue.

The court cannot rule at this point in time; in other words – for the reasons I have stated.

All right. Now, I think that that is all. We will reconvene on Tuesday, at 9:00 a.m. Try not to blow yourselves up, either.

(Laughter in the court.)

THE CLERK: All rise.

(The hearing in the above-entitled cause was concluded at 1:17 p.m.)

- - -

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 99-00239ER
Plaintiff,	)	– VOLUME 8 –
vs.	)	
MICHAEL H. BOULWARE,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

The above entitled matter came on for hearing on Monday, July 11, 2005, at 9:07 a.m., at Honolulu, Hawaii

BEFORE: THE HONORABLE EDWARD RAFEEDIE
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

APPEARANCES: LESLIE E. OSBORNE, JR., ESQ.
U.S. Attorney's Office
300 Ala Moana Blvd., Suite 6100
Honolulu, Hawaii 96813

JARED E. DWYER, ESQ.
U.S. Department of Justice
Tax Division, P.O. Box 972
Washington, D.C. 20044

Attorneys for the Government

DENNIS E.W. O'CONNOR, ESQ.
DENNIS E.W. O'CONNOR, JR., ESQ.
Reinwald O'Connor & Playdon
733 Bishop Street, 24th floor
Honolulu, Hawaii 96813

Attorneys for the Defendant

* * *

[114] Accordingly, the court, without further foundation, will deny the HIE's motion for leave to present evidence of over-reporting of income.

That's subject to reconsideration if a foundation is laid.

The court will now address to the defendant's offer of proof relating to the issue of constructive dividends and returns of capital. Which suffers from the same lack of foundation.

As the court previously explained, the Miller decision, that states that it is not relevant whether the funds could have been classified as a return of capital or a dividend at the time when they were diverted.

There is a violation, even where the diverted funds could have qualified as a return of capital, when the taxpayer fails to properly report the money as income or record it as a return of capital on the corporate books.

That's found at Page 1214 of that decision, 545 F.2d, 1204.

The defendant's offer of proof merely indicates that the defendant would introduce expert testimony that the funds at issue could have been considered return of capital.

Not only would much of this evidence be excludable as expert legal opinion, it is plainly insufficient under the Miller case.

[115] The defendant must not show merely that the funds could have been a return of capital; he must introduce

evidence showing that, at the time of the transfer, the funds were in fact a return of capital.

Based upon the defendant's offer of proof, the court cannot see any benefit in holding any additional hearing on this matter.

The offer of proof fails to satisfy the standard established in the Miller case. In fact, it is expressly contrary to that standard.

And the government's motion in limine to exclude evidence relating to constructive dividends or returns of capital is hereby granted.

Now, this may very well apply to this Hawaii tax adjustment, as well.

But did you wish to be heard on any other issue?

MR. O'CONNOR: Just to clarify, Your Honor.

THE COURT: Yeah?

MR. O'CONNOR: As I understand it, the court is ruling on the over-payment of taxes by the company. Is that correct?

THE COURT: That's right.

MR. O'CONNOR: The court –

THE COURT: Because you filed a motion offering evidence of over-payment –

[116] MR. O'CONNOR: Over-payment.

THE COURT: – of income, and an offer of proof relating to the issue of constructive dividends.

MR. O'CONNOR: A little while ago –

THE COURT: I am ruling on your motion and denying it.

MR. O'CONNOR: Yes, Your Honor.

The question is –

THE COURT: I shouldn't have to explain it.

MR. O'CONNOR: The question is: Can we put on evidence of payment of taxes –

THE COURT: No.

MR. O'CONNOR: – by HIE?

Not over-payment. But the fact that they paid taxes on –

THE COURT: How is that any different than the over-reporting of taxes?

But why is it relevant? It's two different taxpayers. Your client is an individual taxpayer; the corporation is a separate taxpayer.

MR. O'CONNOR: Well, it's relevant –

THE COURT: One ordinarily does not affect the other, unless there's a foundation laid to show that it should.

MR. O'CONNOR: We already have testimony in this

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 99-00239ER
Plaintiff,	)	– VOLUME 11 –
vs.	)	
MICHAEL H. BOULWARE,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

The above entitled matter came on for hearing on Thursday, July 14, 2005, at 9:05 a.m., at Honolulu, Hawaii

BEFORE: THE HONORABLE EDWARD RAFEEDIE
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

APPEARANCES: LESLIE E. OSBORNE, JR., ESQ.
U.S. Attorney's Office
300 Ala Moana Blvd., Suite 6100
Honolulu, Hawaii 96813

JARED E. DWYER, ESQ.
U.S. Department of Justice
Tax Division, P.O. Box 972
Washington, D.C. 20044

Attorneys for the Government

DENNIS E.W. O'CONNOR, ESQ.
DENNIS E.W. O'CONNOR, JR., ESQ.
Reinwald O'Connor & Playdon
733 Bishop Street, 24th floor
Honolulu, Hawaii 96813

Attorneys for the Defendant

* * *

[26] for funds in transit at the beginning and end of the year.

The figure is then adjusted to remove deposits of funds which were not income, and to include income which was never deposited.

This adjusted figure is said to constitute a reconstructed gross income.

Calculation of taxable income then proceeds in the usual way, taking into account the legitimate deduction, exceptions, exclusions and credits.

If the resulting figure differs from what the taxpayer has reported, the government may argue that the difference is unreported taxable income.

Generally, the government must also establish the amount of cash the taxpayer had on hand at the beginning of the year, and exclude this amount. Because some deposits may be the product of the cash the taxpayer already possessed.

However, that is not necessary in this case, because the government did not include any deposits of cash in its analysis.

The state court judgment received into evidence determined that the money that the defendant transferred to his girlfriend, Jin Sook Lee, was not a gift, and remained the property of Hawaiian Isles Enterprises.

That determination is not binding on you.

It may, however, be considered, along with all other [27] evidence, in determining the purpose of the transfer of

the money, and whether it constituted unreported income to the defendant.

The evidence from which you are to decide the facts of the case are – consist of the following:

The sworn testimony of any witness, the exhibits which have been received into evidence, and any facts to which all the lawyers have stipulated.

In reaching your verdict, certain things are not evidence, and you may not consider them in deciding what the facts are.

I will list these for you:

Arguments and statements of the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence.

If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

Now, secondly, questions and objections by lawyers are not evidence.

Attorneys have a duty to their client to object when they believe a question is improper under the rules of evidence.

You should not be influenced by the question, the

* * *

384 F.3d 794

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MICHAEL H. BOULWARE, *Defendant-Appellant.*	No. 02-10287 D.C. No. CR 99-0239 ER
UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. MICHAEL H. BOULWARE, *Defendant-Appellee.*	No. 02-10338 D.C. No. CR 99-0239 ER OPINION

Appeal from the United States District Court
for the District of Hawaii
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
December 1, 2003 – San Francisco, California

Filed September 14, 2004

Before: A Wallace Tashima, Sidney R. Thomas, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Tashima;
Dissent by Judge Silverman

COUNSEL

Dennis E.W. O'Connor, Honolulu, Hawaii, for the defendant-appellant and cross-appellee.

Karen M. Quesnel, Tax Division, U.S. Department of Justice, Washington, D.C., for the plaintiff-appellee and cross-appellant.

OPINION

TASHIMA, Circuit Judge:

Michael H. Boulware appeals from his conviction, after trial by jury, on five counts of filing false tax returns, four counts of tax evasion, and one count of conspiracy to make false statements to a federally-insured financial institution. He contends that all of his convictions must be reversed because the government failed to meet its burden of proof on the tax counts, constructively amended the indictment during trial, and engaged in prosecutorial misconduct. He also contends that the district court prejudicially erred in excluding key evidence and giving inadequate and misleading jury instructions. Finally, he contends that his sentence must be vacated, because the district court failed to resolve factual disputes regarding the amount of the tax loss. In its cross-appeal, the government contends that the district court erred by refusing to enhance Boulware's sentence for obstruction of justice.

Although most of the errors alleged by Boulware do not warrant reversal of his convictions, one of them does. The district court abused its discretion by excluding evidence of a state-court judgment that directly supported Boulware's defense to the tax charges and that directly contradicted the government's theory of the case – that

Boulware had stolen money from his closely-held corporation and gifted it to his girlfriend. As the error went to the heart of Boulware's defense and was not harmless beyond a reasonable doubt, Boulware is entitled to a new trial on the nine tax counts.

I

After a six-year investigation by the Internal Revenue Service ("IRS"), Boulware was indicted on four counts of filing false tax returns for the 1989-1992 tax years, in violation of 26 U.S.C. § 7206(1), one count of conspiring to make a false statement to a federally-insured financial institution, in violation of 18 U.S.C. § 371, and four counts of making such false statements, in violation of 18 U.S.C. § 1014. A tenth count sought forfeiture of funds associated with the false statements. A superseding indictment added five new counts of filing false tax returns, for the 1993-1997 tax years. and four counts of tax evasion, in violation of 26 U.S.C. § 7201, for the 1994-1997 tax years. Finally, a second superseding indictment ("the indictment"), amended the factual allegations of the conspiracy count.

After a six-day trial and two-and-a-half days of deliberations, the jury convicted Boulware on November 29, 2001, of all nine tax counts.[1] The jury also convicted him of conspiring to make false statements to a federally-insured financial institution, but acquitted him of the substantive false statements counts. The district court sentenced Boulware to a 36-month term of imprisonment on each of

[1] During trial, the false tax return counts for the 1994-1997 tax years were severed, redacted from the indictment, and later dismissed with prejudice.

the false tax return counts, 51 months on each of the tax evasion counts, and 51 months on the conspiracy count, all terms to run concurrently.[2]

II

Boulware started M&S Vending in 1979, while working as a telephone repairman. The company placed video games in bars and restaurants, and it quickly expanded into other lines of business, such as cigarette sales. In about 1985, the company was renamed Hawaiian Isles Enterprises ("HIE"); Boulware owned all of the shares. HIE branched out into coffee roasting and sales, and formed a subsidiary named Hawaiian Isles Kona Coffee Company. Boulware later acquired a bottled water company and transferred its stock to HIE. By 1989, HIE was reporting gross receipts of over $55 million, and by 1992 sales had topped $85 million.

At trial, the government sought to prove that Boulware had systematically diverted funds from HIE in order to support a lavish lifestyle. In particular, that he gave millions of dollars of HIE money to his girlfriend, Jin Sook Lee, and millions of dollars to his wife, Mal Sun Boulware, without reporting any of this money on his personal income tax returns. According to the government, he siphoned off this money primarily by writing checks to employees and friends and having them return the cash to him, by diverting payments by HIE customers, by submitting fraudulent invoices to HIE, and by laundering HIE

---

[2] The court also imposed a three-year term of supervised release, fines, and forfeiture of $495,814.

money through companies in the Kingdom of Tonga and Hong Kong.

With regard to the false statements counts, the government attempted to prove that Boulware and a business associate named Lorin Kushiyama received financing from General Electric Credit Company ("GECC") based on the submission of false invoices. In particular, the government tried to prove that the financing was purportedly to allow Kushiyama's company to purchase video game machines that it would then lease or sell to HIE. According to the government, HIE already owned the machines and Kushiyama gave the loan proceeds to Boulware.

The defense case was that Boulware did not underreport income in any of the relevant tax years, because HIE maintained beneficial ownership of all of the funds in question. Even if he did underreport his income, he at all times acted in good-faith reliance on the advice of counsel.

According to Boulware, he intended to use most of the money at issue in this case to buy out his wife's marital interest in HIE and the money was therefore not, or at least arguably not, taxable to him. He asked his wife for a divorce in 1987, and she threatened to force him to liquidate HIE unless he agreed to give her $5 million and a $1 million house. Boulware and his wife realized that it would take time for HIE to buy out her interest. When he told Jin Sook Lee about the agreement, she asked to hold the money as it was accumulating, because she wanted to make sure he saved it for the divorce. His lawyer advised him that (1) his wife had a right to half of the company as her marital share of HIE, and (2) if Lee held the funds in

trust for HIE, the money would not be taxable to Boulware.

Boulware testified that by 1994 he had collected enough HIE money to redeem his wife's share of the company and finalize their divorce. Lee, however, refused to return the money. For this reason, Boulware had to scramble to obtain other funds to buy out his wife's marital interest. For example, he received a $1.7 million loan from Harold Okimoto. Finally in 1997, a Hawaii state-court jury found that the money Lee was holding belonged to HIE. The state court ordered Lee to return the money to HIE.

The defense also tried to show that, despite Boulware's success as an entrepreneur, he was a relatively unsophisticated person who neither understood nor paid attention to accounting issues. A certain disregard of corporate formalities was also due to the fact that he owned and ran the company. In addition, the nature of his business (*e.g.*, purchasing coffee beans in cash from growers on Kona) required that he receive corporate advances to make deals. He always informed his comptroller Merwyn Manago of these transactions, and they were (or Boulware was under the impression that they were) reported on HIE's books and tax returns.

With regard to the GECC loans, the defense made a case that the transactions were not fraudulent. What the government portrayed as false invoices were really legitimate appraisals of the video game machines, which were to serve as collateral for a loan from GECC to HIE.

III

A. Exclusion of the State-Court Judgment

Boulware argues that the district court improperly excluded evidence of a Hawaii civil judgment, which determined that HIE owned the money that Boulware had given to Jin Sook Lee between 1987 and 1994. As the state court found that Boulware had not gifted the funds to Lee and that the funds belonged to HIE, he contends that he had no federal tax liability for those funds. He argues that the improper exclusion of this evidence violated his due process right to present evidence in his defense.

1. Standard of Review

We generally review a district court's evidentiary rulings for abuse of discretion. *United States v. Sua*, 307 F.3d 1150, 1152 (9th Cir. 2002), *cert. denied*, 537 U.S. 1221 (2003). Under this standard, reversal is appropriate only where the trial court made an error of law or a clearly erroneous finding of fact, or where the reviewing court has "'a definite and firm conviction that the district court committed a clear error of judgment.'" *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (quoting *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000)). We review de novo the district court's interpretations of the Federal Rules of Evidence. *United States v. Angwin*, 271 F.3d 786, 798 (9th Cir. 2001).

2. Factual Background

On October 7, 1994, over a year after Boulware became aware that the IRS was investigating him, but four-and-a-half years before he was indicted, Jin Sook Lee

filed a complaint for conversion, breach of contract, and unjust enrichment against Boulware and HIE in Hawaii state court. In the complaint, Lee alleged that Boulware, individually and as an agent of HIE, had taken $840,000 in cash from a safe in her home, had wrongfully acquired a real property belonging to her, and had defaulted on a $1.2 million note. She sought compensatory and punitive damages.

On November 17, 1994, Boulware and HIE answered Lee's complaint and denied all the relevant allegations. Boulware and HIE also filed a counterclaim against Lee for breach of contract, breach of fiduciary duty, unjust enrichment, constructive trust, conversion, quiet title, accounting, declaratory relief, cancellation of instruments, and compensatory and punitive damages.

In Boulware and HIE's counterclaim, they alleged the following facts regarding the payments to Lee:

> 5. In 1987, Boulware was married to Mal Sun Boulware. At that time, due to irreconcilable differences, Michael Boulware and Mal Sun Boulware agreed that they would get divorced because their marriage was beyond redemption. Boulware understood and realized that division of the marital property would require substantial sums of cash and properties in order to satisfy his wife's demands. Boulware wanted to insure that he would not have to sell [HIE] as a result of the divorce. Boulware advised Lee that he and his wife had decided to divorce and advised her of the parties' property division discussions and agreements and that such agreements would require the payment of substantial sums in cash and properties. . . .

> 6. Commencing in or about 1987 [HIE] advanced monies from time to time to Boulware pursuant to oral and written understandings and debt instruments whereby Boulware agreed to account for and repay all such monies not properly accounted for as business expenditures incurred on behalf of the company. Commencing in or about 1987 and continuing through approximately 1993, Boulware transferred directly to Lee, or caused [HIE] to deliver to Lee, certain monies pursuant to the oral and written understandings referenced above. At all times, Lee understood and agreed that all such funds not used by Boulware and Lee for purposes of advancing the business interests of [HIE], had to be repaid in full to Boulware and [HIE]. Lee further understood and agreed that a portion of the funds paid back by her would be used to satisfy the property settlement agreements between Boulware and his then wife Mal Sun Boulware.
>
> * * *
>
> 22. At all times relevant herein, a confidential relationship existed between Lee and Counterclaimaints. Based upon and arising out of said confidential relationship, Counterclaimants transferred to Lee monies and properties valued in excess of $5 million. Lee promised to hold said assets for the benefit of [HIE] and to prevent their dissipation and to reconvey them to Counterclaimants upon demand. . . .

Boulware and HIE sought a declaration that the transfers to Lee were not gifts.

After a trial on the merits, the jury found that the monies were not gifts and that the monies belonged to

HIE. The relevant question on the special verdict form read, as follows:

> *Question No. 10.* Jin Sook Lee claims the cash and checks delivered to her, during the period from March, 1987 to May, 1994, by Michael Boulware and Hawaiian Isles Enterprises were gifts. Michael Boulware and Hawaiian Isles Enterprises claim the monies were not gifts but were to be held by Jin Sook Lee and to be returned when requested. State your findings below:
>
> The monies were gifts to Jin Sook Lee Yes _____ No ✓
>
> The monies belong to Hawaiian Isle Enterprises Yes ✓ No _____

Likewise, in deciding the equitable issues of unjust enrichment and constructive trust, the state court judge found by clear and convincing evidence that the monies were not gifts to Lee. The judgment provides in relevant part:

> As to Counts I, III, IV and V, judgment in favor of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. and against Plaintiff [Lee] in the amount of $4,551,931.00, said amount being the property of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. which has been and is being held in constructive trust by Plaintiff and by which Plaintiff has been and is being unjustly enriched[.]

In this case, Boulware moved to adopt as controlling the state court's determination that the money belonged at all times to HIE and was therefore not taxable to him. The

district court denied the motion on the ground that the jury only determined ownership of the money as between Lee and HIE, and was not asked to determine ownership as between HIE and Boulware.

Boulware then filed a motion in limine to preclude the government from referring to the monies transferred to Lee as gifts, a factual issue that had been subject to adversarial testing in the state court, or alternatively to allow the introduction of the state court judgment to rebut the government's gift theory. The government in turn filed a motion in limine to exclude introduction of the state court judgment on four grounds: (1) the judgment had no preclusive effect, because the United States was not a party to the state action; (2) the state court judgment was not relevant, because it determined ownership of the moneys only as between Lee and HIE and so was not inconsistent with the theory that the money was reportable income to Boulware; (3) the judgment was unreliable, and admitting the judgment would confuse the jury and would lead to a mini-trial to show the deficiencies in the evidence considered in the state case; and (4) the judgment was inadmissible hearsay.

In Boulware's opposition to the government's motion in limine, he argued that collateral estoppel is not the issue. Rather, as a determination of property rights, the state court judgment has preclusive effect for purposes of determining whether he had a federal tax liability. In addition, the state court judgment was relevant to the issue of whether he gifted money to Lee and thereby diverted HIE money for personal purposes. The judgement would also allow him to argue that his failure to amend his tax returns was in good-faith reliance on the state court judgment. He further argued that the district court

did not have jurisdiction to question the reliability of the state court judgment absent a showing of collusion. Finally, Boulware argued that the judgment was admissible as a record of property rights under Federal Rule of Evidence 803(14), and that its probative value far outweighed any danger of unfair prejudice, confusion of the issues, or waste of time.

The district court granted both motions, explaining that "the characterization of this transfer as a gift is not relevant to the ultimate issues of the case" and that the jury should decide the case based on the testimony of the witnesses. The court ruled that no witnesses should discuss the state court judgment, but that he would leave the matter open to reconsideration.

At trial, the government at times suggested to the jury that Boulware gave the money to Lee as a gift, arguing, for example, that Boulware spent the money "to support a lifestyle of a Porsche, a Blazer, a Mercedes; enough of a lifestyle to support an estate in Kahala; support both a wife and a girlfriend, both of whom received millions of dollars. . . ." At other times, however, the government argued that Boulware gave the money to Lee to hide it from the IRS, to hide it from his wife, or to use HIE money to pay off his own obligation to his ex-wife, arguing, for example, that Boulware took the money so that he "could dump his wife without paying a dime." The court sustained the government's objections to questions about the judgment. Boulware himself testified without objection, however, that he ended up in a lawsuit with Lee to force her to return the money, and that she was forced to return $5 million or $6 million to HIE.

3. Analysis

a. *Does the State Judgment Have Preclusive Effect?*

Boulware argues that the state court judgment precluded the government from relitigating the ownership of the funds he delivered to Lee. He bases his argument not on the affirmative defense of collateral estoppel, because the government was not a party to the state lawsuit, but rather on the principle that state law determines the property rights to which federal law attaches tax consequences. Because the state court jury found that Boulware had not gifted the funds to Lee and that the funds belonged t HIE, he argues that he had no federal tax liability for those funds. We disagree.

Boulware relies on cases such as *Freuler v. Helvering,* 291 U.S. 35 (1934), *Blair v. Comm'r,* 300 U.S. 5 (1937), and *Flitcroft v. Comm'r,* 328 F.2d 449 (9th Cir. 1964). These tax cases stand for the proposition that federal courts must treat as binding state court determinations on questions of state law as long as the judgments were not obtained through collusion. In *Flitcroft,* for example, the question was whether the retroactive reformation of a trust by a state court could wipe out a federal tax liability for previous years. *Id.* at 453. We held that the state court proceeding was not collusive and therefore "the adjudication of the state court is given effect, 'not because it is res judicata against the United States, but because it is conclusive of the parties' property rights which alone are to be taxed.'" *Id.* at 459 (quoting *Gallagher v. Smith,* 223 F.2d 218 (3d Cir. 1955)).

These authorities, however, have somewhat been called into question by the Supreme Court's 1967 decision in *Commissioner v. Bosch,* 387 U.S. 456 (1967). There, the

Court held that "where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court." *Id.* at 457; *see also id.* at 465 ("[W]hen the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling"). *Bosch* is distinguishable, however, because it dealt with the federal estate tax statute, and the Court appeared to give great weight to a statement in the legislative history that " 'proper regard,' not finality, 'should be given to interpretations of the will' by state courts and then only when entered by a court 'in a bona fide adversary proceeding.' " *Id.* at 463-64.

It is clear, therefore, that with regard to the calculation of estate taxes, federal courts are not bound by the judgments of a state probate court. *See, e.g., Estate of Rapp v. Comm'r,* 140 F.3d 1211, 1215-16 (9th Cir. 1998). What effect, if any, *Bosch* has outside the context of the estate tax statute is unclear. The Fifth Circuit has held that "[t]he relevance of a state court's judgment to the resolution of a federal tax question will vary, depending on the particular tax statute involved as well as the nature of the state proceeding that produced the judgment." *Estate of Warren v. Comm'r,* 981 F.2d 776, 781 (5th Cir. 1993) (quoting *Brown v. United States,* 890 F.2d 1329, 1342 (5th Cir. 1989)).

Supreme Court precedent pre- and post-*Bosch* suggests that its holding does not apply outside of the estate-tax context. In *Aquilino v. United States,* 363 U.S. 509 (1960), the Court made the following observation:

> It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's "property and rights to property" included property in which, under the relevant state law, he had no property interest at all.

Id. at 513 n.3. More recently, in *United States v. Craft,* 535 U.S. 274 (2002), the Court held that "[s]tate law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law." *Id.* at 278-79; *see also Pahl v. Comm'r,* 150 F.3d 1124, 1128 (9th Cir. 1998) (holding that "we look to federal law to determine what interest creates tax liability. We look, however, to state law to determine whether the taxpayer has the requisite interest.").

Even assuming that the state court judgment is binding as to the ownership of the funds, the question becomes what the state court judgment determined. At a minimum, the state court determined that the money Boulware transferred to Lee was not a gift. The money could still be income to Boulware, however, if he gave it to Lee to hold for him in an effort to hide it from the IRS. *See Chism v. Comm'r,* 322 F.2d 956, 959-60 (9th Cir. 1963) (holding that the tax court did not err in refusing to be bound by a state court determination that withdrawals

from a closely-held corporation were loans and not dividends, because "it is not the existence of a legal obligation to repay that is controlling"; rather, whether a withdrawal is a loan "is a factual question 'to be determined upon consideration of all the circumstances present in a particular case, and depends upon the existence of an intent at the time the withdrawal is made that it should be paid back.'" (quoting *Clark v. Comm'r*, 266 F.2d 698, 710-11 (9th Cir. 1959))).

Boulware argues that the state court finding that Lee was holding the money in trust for HIE is also binding. The state court did find that the money in question belonged to HIE and that Lee had been and was holding it in "constructive trust" for HIE. On the other hand, although the record from the state court action is not part of the record on appeal, the ownership of the money as between Boulware and HIE does not appear to have been subject to adversarial testing. The special verdict form asked the jury to determine ownership only as between Lee and HIE, presumably because Boulware never claimed the money was his. If Lee maintained that she had received the money as a gift, and Boulware contended that he had given her the money to hold in trust for HIE, there would have been no reason to ask the jury if Boulware owned the money, because it was not an issue in the lawsuit.

For these reasons, we hold that the district court did not err in ruling that the state court judgment does not have preclusive effect as to the ownership of the monies.

b. *Was the State-Court Judgment Admissible Evidence?*

(1) *Relevance*

Even though the state court judgment did not have preclusive effect, the question still remains whether it was admissible evidence that the district court improperly excluded. The district court excluded the state court judgment pursuant to Federal Rules of Evidence 401 and 402, stating that whether the transfers to Lee were gifts "is not relevant to the ultimate issues of the case." This ruling was erroneous. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Whether Boulware transferred the HIE funds to Lee for personal purposes or for her to hold in trust for HIE was a key issue in the case. That he pursued a successful litigation against Lee to force her to return the monies to HIE has some tendency to make it more likely that he gave the monies to her to hold in trust. Indeed, the government conceded at oral argument that the state court judgment is relevant.[3]

---

[3] The dissent's argument that the judgment "does not prove, or even tend to prove" that Boulware did not siphon off the money from HIE is mistaken, both legally and factually. For evidence to be relevant, and thus admissible, Rule 401 does not require that it "prove" anything. Rule 401's only requirement is that the proffered evidence have a *tendency* to prove a fact in issue and the judgment certainly has *some* tendency to make Boulware's explanation (that he gave the money to Lee to hold in trust for HIE) more probable and the government's theory of the case (that he simply gave the money to Lee) less probable. Rule 401 requires no more.

(2) *Hearsay*

Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). A prior judgment is therefore hearsay to the extent that it is offered to prove the truth of the matters asserted in the judgment. A prior judgment is not hearsay, however, to the extent that it is offered as legally operative verbal conduct that determined the rights and duties of the parties. *See United States v. Pang,* 362 F.3d 1187, 1192 (9th Cir. 2004). Although Rule 803 contains exceptions for certain kinds of judgments, such as judgments of previous felony convictions and judgments as to personal, family, or general history or boundaries, *see* Fed. R. Evid. 803(22) & (23), civil judgments do not fit comfortably into any hearsay exception.[4]

Boulware argues that the state court judgment fits the exceptions set forth in Rule 803(14) and (15). The first of these exceptions concerns records of documents that affect an interest in property, and reads as follows:

> **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded

---

[4] Certain kinds of judgments fall under statutory or common law exceptions. *See, e.g.,* 15 U.S.C. § 16(a) (providing that "[a] final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto").

> document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Fed. R. Evid. 803(14).

In *United States v. Perry,* 857 F.2d 1346 (9th Cir. 1988), a criminal tax prosecution, the government introduced testimony regarding a bankruptcy court's determination that certain transfers of property were fraudulent conveyances. *Id.* at 1351. We held that admission of the testimony was not plain error:

> The challenged testimony was not, as Perry urges, offered as substantive proof of a fraudulent scheme. A review of the record shows that the testimony was offered only to show that Perry was the true owner of certain properties nominally owned by his relatives. *See Greycas, Inc. v. Proud,* 826 F.2d 1560, 1567 (7th Cir. 1987) . . . ("a judgment, insofar as it fixes property rights, should be admissible as the official record of such rights, just like other documents of title"). This evidence, in turn, was relevant to prove that Perry had concealed his assets. From it, the jury could infer that Perry had intended to evade federal income taxes, charges for which he was on trial.

Id. at 1351-52 (footnote and ending citation omitted). Similarly, in *Greycas, Inc. v. Proud,* 826 F.2d 1560 (7th Cir. 1987), a case on which *Perry* relied, the Seventh Circuit noted that the state court judgment at issue in the case should be admissible under Rule 803(14) to show the priority of liens, "fix[ing] Greycas's rights, equivalent to

title, in Crawford's farm machinery." *Id.* at 1567 (citing Rule 803(14)).

Thus, *Perry* supports the proposition that a previous judgment is admissible under Rule 803(14) to show the ownership of assets. To the extent that Boulware offered the judgment simply for the purpose of establishing HIE's ownership of the funds in 1997 and Lee's legal obligation to return those funds, he was offering the judgment not for the truth of the matters asserted in the judgment, but rather to establish the judgment's legal effect. As this is a nonhearsay purpose, we see no need to resort to the hearsay exception set forth in Rule 803(14).

Moreover, to the extent that Boulware offered the judgment for the truth of the matters asserted – to establish that he had not gifted the funds to Lee and that she was and had been holding them in constructive trust for HIE – the judgment meets the exception set forth in Rule 803(15):

> **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

The Federal Rules of Evidence are an act of Congress, and we must therefore interpret Rule 803(15) as we would a statute, *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993), in accordance with its plain meaning, *see Bourjaily v. United States*, 483 U.S. 171, 178-79 (1987) (interpreting Rule 104 in accordance with its

plain meaning); *see also Garcia v. United States,* 469 U.S. 70, 75 (1984) (noting that "only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language").

Under the plain meaning of Rule 803(15), hearsay statements are admissible if they are contained within a document that affects an interest in property, if the statements are relevant to the purport of the document, and if dealings with the property since the document was made have not been inconsistent with the truth of the statements. *See Silverstein v. Chase,* 260 F.3d 142, 149 (2d Cir. 2001). Here, the state court judgment meets each of these requirements. The judgment affected an interest in property by declaring HIE to be the legal owner of the funds and by requiring Lee to return them to HIE, and the statements are relevant to the purport of the document. In addition, there is no indication that the parties acted inconsistently with the judgment; it was undisputed that the judgment was valid and could be authenticated.

The legislative history is not clearly to the contrary. The Advisory Committee's note to Rule 803(15) explains that "[d]ispositive documents often contain recitals of fact" and that "[u]nder the rule, these recitals are exempted from the hearsay rule." Although the note uses the example of a deed, a judgment that establishes the ownership of disputed items of property is no less of a dispositive document, and the judgment's recital of facts is no less exempt from the hearsay rule. For these reasons, we hold that the state court judgment was admissible under Rule 803(15) as a document that affected an interest in property.

Finally, the district court excluded on relevance grounds not only the state court judgment and testimony about the judgment, but also testimony about the underlying lawsuit between Lee and Boulware. For example, the court would not allow Boulware's tax attorney to testify about the lawsuit for the nonhearsay purpose explaining why he had advised Boulware not to list the monies transferred to Lee as income. For all of the reasons discussed above, the hearsay rule did not prohibit Boulware from introducing the state court judgment or testimony about the underlying lawsuit.

(3) *Rule 403*

In its motion in limine to exclude the state court judgment, the government argued that the judgment was unreliable, and admitting the judgment would confuse the jury and would lead to a mini-trial to show the deficiencies in the evidence considered in the state case.

At a minimum, the state court's finding that HIE owned the money in 1997 was relevant to show that HIE had owned the money all along and to rebut the government's suggestions that Boulware had concocted the whole "Lee as trustee" story to defend himself in the criminal prosecution.[5] Any danger that the jury would have given undue weight to the state court judgment could have been dealt with by a cautionary instruction. Likewise, even if introduction of the judgment would have led the prosecution to cross-examine witnesses about deficiencies in the

[5] The prosecutor argued, for example, that there was no evidence that Boulware owed his wife anything "except in the rather fertile imagination of [his counsel]."

evidence heard by the state court jury, the trial judge should easily have been able to control any waste of time or confusion of the issues, so that admission of the state court judgment would not have substantially outweighed the probative value of the evidence.[6]

(4) *Harmless Error*

Although it was error to exclude the state court judgment, the error is not reversible if it was harmless. If the error amounts to a constitutional violation, we apply the "harmless beyond a reasonable doubt" standard. *See Chapman v. California,* 386 U.S. 18, 24 (1967).

"[N]ot every hearsay error amounts to a constitutional violation. At a minimum, a defendant must demonstrate that the excluded evidence was important to his defense." *United States v. Lopez-Alvarez,* 970 F.2d 583, 588 (9th Cir. 1992); *see also United States v. Saenz,* 179 F.3d 686, 689 (9th Cir. 1999) (holding that "[e]rror cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense"). Here, the state-court judgment was crucial to Boulware's defense on the tax counts, and the judgment directly contradicted the government's theory of the case. The district court's exclusion of the

---

[6] The dissent "would hold that the district court did not abuse its discretion in ruling the Hawaiian judgment inadmissible," based on its belief that the district court conducted an "[i]mplicit . . . evaluation of probative value." The district court, however, did not perform a Rule 403 balancing analysis; rather, it simply held that the evidence was "not relevant to the ultimate issues of the case" and granted the government's motion to exclude the judgment "pursuant to Rules 401 and 402 of the Federal Rules of Evidence." We therefore review de novo, rather than for abuse of discretion, whether the judgment was properly excludable under Rule 403.

judgment denied Boulware "a meaningful opportunity to present a complete defense," *Lopez-Alvarez,* 970 F.2d at 587-88, and thus violated his due process rights. We must therefore reverse unless the error was harmless beyond a reasonable doubt.

The government argues that the error was harmless because Boulware himself testified on direct examination about the judgment.[7] Boulware makes the point, however, that he was the least effective witness to testify about the judgment because of his perceived self-interest and bias. In addition, although he called witnesses who testified that HIE at all times owned the funds that he transferred to Lee and that he relied in good faith on the advice of his lawyer and accountants in not reporting the funds on his

---

[7] Boulware's testimony on this subject was as follows:

Q. So, during that time period, in the spring of '94, after you got your divorce, did Jin Sook Lee agree to return the company's money to HIE?

A. No.

Q. Did you end up in lawsuits with Jin Sook Lee to force her to return the money?

A. Yes.

Q. And then approximately in 1997, was Jin Sook Lee forced to return money to the company?

A. Yes.

Q. Approximately how much?

A. Five, six million.

Q. I'm sorry?

A. Five, six million.

Q. But during the time period from 1994 to '97, the company didn't receive its money back from Jin Sook Lee, did it?

A. No.

tax returns, he points out that the prosecution sharply attacked the credibility of these witnesses, and the judgment would have been key corroborative evidence.

Another reason the exclusion of the state court judgment may have been harmless is that Boulware's story was somewhat implausible. Rather than setting up a formal arrangement by which money would be held in trust to buy out his wife's interest in HIE, Boulware gave corporate money to his girlfriend. In addition, he transferred the money to her in a series of shady transactions. Rather than putting the cash in a bank account so that it could earn interest, Lee held the cash in a safe in their home. Finally, Boulware did not sue Lee for a return of the funds until she sued him.

Nevertheless, the beneficial ownership of the funds that Boulware transferred to Lee was central to the entire case against him, and the government did not call Lee or any other witness to rebut Boulware's claim that he gave the money to her to hold in trust for the purchase of his ex-wife's marital interest.[8] Boulware's attorney Michael McCarthy testified that in 1987 Boulware retained him to establish a trust for Boulware and Lee's nonmarital son, Glenn Lee Boulware. Half of the shares of HIE were put into the trust. McCarthy advised Boulware that Lee, as the trustee of a trust that held a 50% ownership interest in HIE, would be a constructive trustee of any assets she received that belonged to HIE. He advised Boulware that

---

[8] The government did call Boulware's ex-wife, Mal Sun Boulware, to the stand, but she did not necessarily help the government's case. On cross-examination, she confirmed that when Boulware asked her for a divorce in 1987, she demanded $5 million and a $1 million house because she believed she had an ownership interest in HIE.

any HIE property given to Lee would continue to belong to HIE, and would never belong to Lee or Boulware.

In the end, we are not convinced beyond a reasonable doubt that the jury would have arrived at the same verdict had testimony regarding the state court judgment and the judgment itself not been excluded. We therefore reverse Boulware's convictions on all of the tax evasion and false tax return counts and remand for a new trial.

B. Sufficiency of the Evidence

Boulware also contends that we must reverse his convictions for filing false tax returns and tax evasion because the government failed to prove that he underreported his income. Although we reverse Boulware's conviction, we must still consider his contention that the evidence was insufficient to sustain his conviction, because a challenge to the sufficiency of the evidence implicates a defendant's rights under the Double Jeopardy Clause. *See United States v. Recio,* 371 F.3d 1093, 1104 (9th Cir. 2004); *United States v. Gergen,* 172 F.3d 719, 724-25 (9th Cir. 1999).

1. Standard of Review

Where, as here, the defendant made timely motions for acquittal, we review his insufficiency of the evidence claim de novo. *United States v. Odom,* 329 F.3d 1032, 1034 (9th Cir. 2003). We will deny the claim if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime proved beyond a reasonable doubt. *Id.*

2. Analysis

Boulware was convicted on counts 1-5 of filing false tax returns in violation of 26 U.S.C. § 7206(1) for the 1989-1993 tax years. He was also convicted on renumbered counts 6-9 of tax evasion in violation of 26 U.S.C. § 7201 for the 1994-1997 tax years.

The elements of the offense of filing false tax returns under § 7206(1) are as follows:

> (1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984). The elements of tax evasion under § 7201 are "(1) the existence of a tax deficiency, (2) willfulness in attempted evasion of taxes, and (3) an affirmative act constituting an evasion or attempted evasion." *Id.* at 1377-78.

Boulware's convictions under §§ 7206(1) and 7201 hinge on the fact that he diverted funds from HIE but did not report them as income on his personal income tax returns. Boulware argues that although he controlled the funds in question, the government introduced no evidence that this control was inconsistent with ownership of the funds by HIE. Although the government argued to the jury that Boulware "stole" the money from HIE, the government

did not establish any of the required elements of theft under Hawaii law. Finally, he argues, the diversions could not have constituted taxable constructive dividends, because HIE had no positive earnings or profits during the years charged in the indictment.

The sufficiency of the evidence issue boils down to whether the government could have proved the elements of §§ 7206(1) and 7201 beyond a reasonable doubt without proving either that Boulware stole the funds from HIE or that the funds were not loans or nontaxable returns of capital. *United States v. Miller,* 545 F.2d 1204 (9th Cir. 1976), indicates that the answer to this question is "yes."

Miller, like this case, concerned the characterization of funds that a taxpayer diverted from his closely-held corporation. *Id.* at 1211. The defendant argued that his conviction for tax evasion could not stand, because the government had not proved that his corporation had any earnings and profits during the years in question. *Id.* at 1210. Therefore, his diversions must be treated as a return of capital. *Id.* at 1210-11. The court rejected this argument, stating that "[i]n a criminal tax proceeding the concern is not over the type or the specific amount of the tax which the defendant has evaded, but whether he has willfully attempted to evade the payment or assessment of a tax." *Id.* at 1214. The court also held that the defendant had the burden of going forward once the government "demonstrates that the taxpayer had unexplained funds which *could be considered* as income which the taxpayer fails to report in his return." *Id.* at 1215 & n.13 (emphasis added).

Boulware counters that the government did not make out a prima facie case on the false tax return and tax

evasion counts because it used a bank-deposits method of proof and failed to investigate leads that were reasonably susceptible of being checked. In particular, HIE's comptroller testified to the grand jury that HIE had fully reported the $10.2 million at issue and submitted records in support of this contention. In addition, the government knew of a bankruptcy action in which the court affirmed the trustee's determination that assets held by Lee belonged to HIE.

The theory behind the bank-deposits method of proof was described long ago, as follows:

> [I]f it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable.

Gleckman v. United States, 80 F.2d 394, 399 (8th Cir. 1935) (quoted in 2 Kenneth E. North, *Criminal Tax Fraud* § 23.41, at 405 (3d ed. 1998)). When using the bank-deposits method of proof, the government must conduct an adequate and full investigation to remove non-income deposits, such as transfers between bank accounts. *United States v. Stone,* 770 F.2d 842, 844 (9th Cir. 1985). "The critical question is whether the government's investigation has provided sufficient evidence to support an inference that an unexplained excess in bank deposits is attributable to taxable income." *Id.* at 844-45. Although the government must be especially thorough in its investigation and presentation, "it is well settled that the government is not obliged to prove the exact amount of a deficiency so long as

the taxpayer's understatement of income is substantial." *Id.* at 845.

Here, the government witness who performed the bank-deposits analysis, Jerry Yamachika, testified that he "eliminated . . . any loans that may have come – that Mr. Boulware might have gotten from his company. . . ." On cross-examination, Yamachika testified that he credited Boulware with deductions for money in the bank accounts that was used to buy coffee, and that "an analysis was done as to what credit he was given on his loan account at the corporation to reduce his loan for the purchases he made." Based on the testimony at trial, "[t]he evidence was more than adequate to support the inference that the defendant's bank deposits were income from [HIE] and were in fact currently taxable but unreported income." *Id.* at 845.

Boulware argues that even if the government did make out a prima facie case, he met his burden of going forward with the evidence by testifying that the diversions were loans and were accounted for as such on HIE's books. This put the burden back on the government to prove the deposits were not loans. The nature of the transactions, however, was sufficient evidence for a rational juror to conclude beyond a reasonable doubt that the deposits were not loans.

We conclude that there was ample evidence from which a rational juror could have concluded that Boulware was guilty of willfully submitting false tax returns for the 1989-1993 tax years and of willfully evading taxes for the 1994-1997 tax years.

C. Other Asserted Trial Errors

Boulware further contends that his conviction should be reversed because of a number of asserted trial errors, including constructive amendment of the indictment by the prosecutor and prosecutorial misconduct. Most of these errors, however, were not objected to at trial; therefore, we would review them under the plain error rule of Fed. R. Crim. P. 52(b). *See, e.g. United States v. Dipentino,* 242 F.3d 1090, 1094 (9th Cir. 2001). We see no useful purpose in reviewing these asserted errors. First, a ruling under plain error review will give the district court little assistance on retrial on how it should rule if a timely objection is made. Second, we will not assume that any trial error is likely to be repeated in a retrial.

We briefly address Boulware's Confrontation Clause claim, however, because it relates directly to his conviction for conspiracy to make false statements to a federally-insured financial institution. Boulware contends that the district court violated his rights under the Confrontation Clause by limiting his cross-examination of Lorin Kushiyama, his alleged co-conspirator on count 10. Whether limitations on cross-examination violate the Confrontation Clause is a question that we review de novo. *United States v. Adamson,* 291 F.3d 606, 612 (9th Cir. 2002).

Boulware argues that the district court would not allow him to cross-examine Kushiyama about whether he agreed with Boulware to submit fraudulent invoices, an essential element of the conspiracy charge. The district court sustained a string of objections on relevance grounds to questions regarding whether Kushiyama had prepared invoices or appraisals for *other parties.* When defense counsel asked Kushiyama "As far as these invoices, you

are not the – intending to submit fake invoices to anyone, were you?," the judge sustained the government's objection and defense counsel did not pursue the matter further.

Although it is not completely clear whether "these invoices" referred to those prepared for Boulware or to ones prepared for other customers, the court was obviously under the impression that they referred to invoices for other parties and defense counsel did nothing to disabuse him of this impression. Defense counsel did not reword the question, explain to the court that he was inquiring about the invoices at issue in this case, or call Kushiyama as a defense witness.

For these reasons, the limitation on the cross-examination of Kushiyama was not so severe as to amount to a violation of Boulware's Confrontation Clause rights.

D. Sentencing Issues

Among other sentencing issues, Boulware contends that the district court erred in its calculation of the tax loss attributed to his offense, including the court's failure to hold an evidentiary hearing. In its cross-appeal the government contends that the district court erred in declining to enhance Boulware's sentence for obstruction of justice. Given our reversal and remand for a new trial on the tax counts, no purpose would be served by our review of the sentencing issues.

Sentence was imposed in this case well before *Blakely v. Washington,* 124 S.Ct. 2531 (2004), wrought a sea change in sentencing, and *United States v. Ameline,* 376 F.3d 967 (9th Cir. 2004), held that *Blakely* was applicable to certain aspects of sentencing under the U.S. Sentencing

Guidelines.[9] Under these circumstances, because we are reversing and remanding for a new trial on most counts, in the event there is a conviction (and in any event on the remaining, unreversed count) when the district court resentences Boulware, it will be under the then extant post-*Blakely* regime.

We must, however, address Boulware's challenge to the district court's forfeiture order, because we affirm his conviction for conspiracy to make false statements to a federally insured financial institution and because Boulware waived his right to a jury determination of the forfeiture issue.

Boulware argues that the district court's forfeiture order was erroneous, because it did not give him credit for funds he returned to the lender. The jury convicted Boulware of renumbered count 10 of the indictment, conspiracy to make false statements to a federally-insured financial institution, but acquitted him of the substantive charges (counts 11-14). Renumbered count 15 of the indictment charged that Boulware shall forfeit proceeds that he obtained directly or indirectly as a result of the offenses charged in counts 10-14.

18 U.S.C. § 982(a)(2) provides:

> The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate –

---

[9] The Supreme Court has granted certiorari in two cases, *United States v. Booker*, 2004 WL 1713654 (U.S. Aug. 2, 2004), and *United States v. Fanfan*, 2004 WL 1713655 (U.S. Aug. 2, 2004), which present the question of *Blakely's* application to the U.S. Sentencing Guidelines.

> (A) section . . . 1014 . . . of this title, affecting a financial institution . . .
>
> * * *
>
> shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

Nothing in the text of the statute entitles Boulware to a set-off for loan proceeds that he repaid to GECC. In fact, § 982(b)(1) incorporates the provisions of 21 U.S.C. § 853(c), which provides that "[a]ll right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section." Finally, that defendants may be required to pay restitution and forfeit the same amounts indicates that Boulware is not entitled to receive a credit for funds he returned. *Cf. United States v. Bright*, 353 F.3d 1114, 1125 (9th Cir. 2004) (holding that forfeited funds need not be applied toward restitution); *United States v. Feldman*, 853 F.2d 648, 663-64 (9th Cir. 1988) (holding that the sentencing option of ordering restitution "is not denied to the district court because a defendant must also forfeit the proceeds of illegal activity").

The district court did not err in failing to reduce the amount of the forfeiture. The criminal forfeiture statute contains nothing comparable to the civil forfeiture statute's provision that "[i]n cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim," Civil

Asset Forfeiture Reform Act of 2000, Pub. L. 106-185, 114 Stat. 202, § 20(b), *codified at* 18 U.S.C. § 981(a)(2)(C).

IV

We reverse Boulware's conviction for tax evasion and filing false tax returns and affirm his conviction for conspiracy to make false statements to a federally-insured financial institution. We vacate his sentence on the false statement count and remand for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

SILVERMAN, Circuit Judge, dissenting:

In my view, the district court did not abuse its discretion in refusing to admit the state court judgment into evidence. The judgment does no more than establish that, as between Jin Sook Lee and Hawaiian Isles Enterprises, the money belonged to Hawaiian Isles Enterprises. This has no bearing on whether Boulware diverted corporate funds to his girlfriend for his own benefit without paying tax on the money. The judgment establishes only that *she* was not entitled to keep the cash. It does not prove, or even tend to prove, that *he* didn't siphon off the money from the corporation, tax-free. Why would it? That was not at issue in the case.

District courts have wide latitude in ruling on the relevancy of evidence. *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Implicit in any such ruling is an evaluation of probative value. 1 McCormick on Evidence § 185, at 637 (5th ed. 1999) ("There are two components to relevant evidence: materiality and probative

value."). Because the state court judgment against Lee sheds little if any light on whether Boulware committed tax evasion, I would hold that the district court did not abuse its discretion in ruling the Hawaiian judgment inadmissible. I would affirm the district court and, therefore, respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL H. BOULWARE, Defendant-Appellant.	No. 05-10752 D.C. No. CR-99-0239-ER ORDER DENYING PETITION FOR REHEARING EN BANC (Filed Apr. 23, 2007)

Before: RYMER and THOMAS, Circuit Judges, and LARSON,*

The panel has unanimously voted to deny the appellant's Petition for Rehearing. The Petition for Rehearing En Banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.